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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 609

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD, and NEWCOMBE C. BAKER, as a Common Stockholders' Committee, Equitable Office Building Corporation,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

No. 610

EQUITABLE OFFICE BUILDING 1913 CO., INC.,

Petitioner,

v.

J. DONALD DUNCAN, as Trustee, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS

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November 14, 1946.

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REPLY BRIEF OF PETITIONERS

Most of the arguments of respondents in opposition to the petitions show not that the petitions should be denied, but, on the contrary, that there *are* important and undecided questions in these cases which warrant the granting of certiorari, and Petitioners' affirmative arguments to this effect have already been stated. We wish to reply briefly, however, to respondents' contention that the cases are moot (Brief of Debenture Holders, p. 27; Supplemental Brief of

Debenture Holders Committee, p. 2), because the time within which the underwriting offer of City Investing Company might have been accepted has expired.

City Investing Company's offer, when made, contained a reasonable time (90 days) for its acceptance and was outstanding when these petitions were filed. It would be highly unreasonable to expect that the unilateral commitment for over $5,000,000 contained in that offer should be kept open during the indefinite period required for the conclusion of the instant litigation. On the other hand, it is not at all unreasonable to expect that if the pending appeals are successful a new underwriting proposal will be made—and negotiations with City Investing Company which are currently in progress give a strong indication that such expectation will be realized.

It has been primarily the action of the respondents herein, the Debenture holders, in opposing acceptance of City Investing Company's underwriting offer and the contemplated payment in cash of their debts which has brought about the expiration of that offer before it could be accepted or even entertained on its merits. Under these circumstances, the rule stated in *Mills* v. *Green*, 159 U. S. 651, 653 (1895) that where events have transpired "without any fault" of the respondent which make it impossible to grant "any effective relief whatever" the Court will dismiss a pending appeal, is not applicable.

In the instant case a determination of the pending appeals in favor of Petitioners will grant to them "effective relief"—namely, the opportunity to be heard before the district court upon the merits of their proposals for paying off creditors, preserving the equity of stockholders, and dismissing the bankruptcy proceedings. As heretofore stated, Petitioners have reasonable cause to believe that if and when that opportunity is afforded to them they will be able, as they were in July, to submit to the district court a meritorious underwriting offer. If, contrarywise, the

pending appeals should be dismissed without a determination of the substantive questions which are involved, solely because the particular underwriting offer which Petitioners unsuccessfully attempted to present to the district court has expired, as a practical matter Petitioners will never be given the opportunity to have their "day in court". Obviously, no prudent business or banking firm is going to make a substantial underwriting offer of unlimited duration and, as a consequence, any effort by Petitioners to have a meritorious underwriting proposal considered in this case will be unsuccessful so long as the district court abides by its present convictions as to the law, thus forcing Petitioners into the appellate courts, and the appellate courts then dismiss the matter as moot as soon as the underwriting commitment expires. Consequently, the fact that City Investing Company's offer has expired should not foreclose Petitioners' right to have the questions which have been raised as to the district court's authority in the premises finally determined upon the instant appeals. See *United States* v. *Freight Association*, 166 U. S. 290, 308-309 (1896); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 515 (1910).*

With respect to this point, we call attention to that portion of the opinion of Mr. Justice Reed in the instant case (R. 368-369) wherein he said:

> "I do not think that the present debenture holders' objection to the early termination of the

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* Upon argument of the appeal of the stockholders Knight and Doyle (petitioners in No. 612 in this Court) before the Circuit Court of Appeals for the Second Circuit on November 11, 1946, a motion was made by counsel for the Debenture Holders Protective Committee to dismiss all three appeals in that Court (including the appeals therein of Petitioners) as academic and moot, on the ground that the offer of City Investing Company had expired. That motion was summarily and unanimously denied from the bench, Judges L. Hand, A. Hand and Chase participating.

> underwriting proposal is sound. It is the debenture holders' objection to accepting payment of their debts in full that delays prompt cash payment through the issue of trustee's certificates."

Strong evidence that there is still a real controversy here is that respondents are urging, as an alternative to their contention that the cases are moot, that they are entitled as of right to values which they obviously believe to be in excess of the principal amount of their debentures and the accrued interest thereon.

Conclusion

It is respectfully submitted that certiorari should be granted.

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